IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJID KHAN, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 06-CV-1690 (RBW)

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR EMERGENCY ACCESS TO COUNSEL AND ENTRY OF AMENDED PROTECTIVE ORDER

Respondents hereby respectfully submit this memorandum in opposition to the motion filed by petitioners' counsel seeking entry in this case of the protective order and counsel access regime used in certain other Guantanamo detainee cases ("Petrs' Motion"). This Court lacks jurisdiction to enter such a regime, and, in any event, the regime requested by petitioners' counsel is inadequate in light of special concerns presented by petitioner's circumstances. As explained below, pursuant to the amendments to the *habeas* statute, 28 U.S.C. § 2241, made by the Detainee Treatment Act of 2005 and the recently enacted Military Commissions Act of 2006, this Court lacks jurisdiction over this case; indeed, it clearly lacked jurisdiction the day the case was filed. The Detainee Treatment Act and the Military Commissions Act, by their explicit terms, withdraw *habeas* and other jurisdiction of the District Courts to consider detention-related claims of individuals such as petitioner. Providing the relief requested by petitioners' counsel would be inconsistent with the complete absence of jurisdiction of this Court over the case.

In addition, petitioners' counsel's requested relief should also be denied because the protective order and counsel access regime counsel requests is inadequate in light of special circumstances in this case. While petitioner is currently held in Department of Defense custody at Guantanamo Bay, he was previously detained in the custody of the Central Intelligence Agency, as part of its still highly classified, high-value terrorist detainee program. By virtue of this prior detention, any protective order and counsel access regime must appropriately address the handling of information of a classification level and sensitivity that is not adequately protected or addressed by the protective order regime that petitioners' counsel requests, *i.e.*, the regime applicable in various other Guantanamo detainee cases.

Any appropriate protective order and regime for counsel access, however, should be developed or entered only by a forum court that, consistent with statute, has jurisdiction. The most the Court should do at this stage is either schedule proceedings to deal with the jurisdictional issue or await consideration of the jurisdictional issue by the Court of Appeals in the cases pending before it, while staying proceedings in the case – including with respect to petitioners' request for entry of a protective order regime. In any event, petitioners' counsel's motion should be denied.

BACKGROUND

This case was initiated by the filing of a petition for writ of *habeas corpus* on September 29, 2006. *See* Petition (dkt. no. 1). The petition purports to be filed on behalf of Majid Khan, a detainee at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo"), through Khan's wife, a Pakistani citizen, Rabia Khan. *See id.* ¶ 11. The petition, however, is neither

signed nor verified by the purported next friend, as required by statute. *See* Petition; 28 U.S.C. § 2242.

Majid Khan is unique among most of the Guantanamo detainees. He is one of fourteen terrorist leaders and operatives who were recently transferred to Guantanamo to the custody of the Department of Defense ("DoD") from the custody of the Central Intelligence Agency ("CIA"). The CIA had previously held Khan as part of a special, limited program operated by that agency to capture; detain (in secret, off-shore facilities); and interrogate key terrorist leaders and operatives in order to help prevent terrorist attacks. *See* Declaration of Marilyn A. Dorn ¶¶ 7, 10, 16 ("Dorn Decl.") (attached as Exhibit 1)[1]; *see also* President George W. Bush, Speech: President Discusses Creation of Military Commissions to Try Suspected Terrorists (September 6, 2006) (copy attached as Exhibit 2) (acknowledging CIA program; discussing Majid Khan involvement in program).[2] The importance of the program to national security interests cannot be overstated. Information obtained through the program has provided the United States with one of the most useful tools in combating terrorist threats to the national security. Dorn Decl. ¶ 11. It has shed light on probable targets and likely methods for attacks on the United States, has led to the disruption of terrorist plots against the United States and its allies, and has gathered information that has played a role in the capture and questioning of senior Al Qaeda operatives. *Id*. Many aspects of the high-value-terrorist detainee program remain classified as TOP SECRET, Sensitive Compartmented Information ("TOP SECRET//SCI"). *Id.* For

[1] Ms. Dorn serves as the Information Review Officer for the National Clandestine Service of the CIA, and is responsible for ensuring that disclosure of information does not jeopardize CIA interests, personnel, or facilities or compromise CIA intelligence activities, sources, or methods. *See* Dorn Decl. ¶¶ 1-3.

[2] The text of the President's speech is also available at <<http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>> .

example, information such as where detainees have been held, the details of their confinement, interrogation methods, and other operational details constitute or involve TOP SECRET//SCI information. *Id.*

Under Executive Order 12958, as amended,[3] the anticipated severity of the damage to national security resulting from disclosure determines which of three classification levels is applied to information. Thus, if an unauthorized disclosure of information reasonably could be expected to cause damage to the national security, that information may be classified as CONFIDENTIAL; serious damage may be classified as SECRET; and exceptionally grave damage may be classified as TOP SECRET. *Id.* § 1.2. Section 4.3 of Executive Order 12958 further provides that specified officials may create special access programs upon a finding that the vulnerability of, or threat to, specific information is exceptional, and the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure. The Director of the CIA is responsible for establishing and maintaining special access programs relating to intelligence activities, sources, and methods. *Id.* § 4.3. These special access programs relating to intelligence are called Sensitive Compartmented Information, or SCI, programs. *See* Dorn Decl. ¶ 9. As noted above, many aspects of the high-value terrorist detainee program are classified at the TOP SECRET//SCI level.

Khan is currently detained at Guantanamo and is awaiting a Combatant Status Review Tribunal ("CSRT"), a DoD proceeding in which a Guantanamo detainee's status as an enemy

[3] *See* Executive Order 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003).

combatant is reviewed and determined. During CSRT proceedings, a detainee is provided with notice of the unclassified factual basis for his classification as an enemy combatant, he is allowed to present reasonably available evidence on his own behalf, and the tribunal members then make an independent determination as to whether the detainee should be designated as an enemy combatant. *See* Deputy Secretary of Defense Memorandum, "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" (July 14, 2006) (available at <<www.defenselink.mil/news/ Combatant_Tribunals.html>> under "CSRT Procedures").

The petition in this case was filed on September 29, 2006. At that time, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2680 (10 U.S.C. § 801 note) ("DTA"), enacted on December 30, 2005, had amended the *habeas* statute, 28 U.S.C. § 2241, to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) a *habeas* petition filed by an alien detained by DoD at Guantanamo, or (2) "any other action against the United States or its agents relating to any aspect of the detention" of such aliens. *See* DTA § 1005(e)(1). While the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. __, 126 S. Ct. 2749, 2762-69 (2006), held that this particular aspect of the amendment to the *habeas* statute did not apply to *habeas* petitions pending prior to the enactment of the Act, the petition in this case was filed well after enactment of the Act. *See also* DTA § 1005(h)(1) (provision withdrawing court jurisdiction "take[s] effect on the date of enactment" of the DTA). In addition, the Detainee Treatment Act created an exclusive review mechanism in the D.C. Circuit to address the validity of the detention of such aliens held as enemy combatants: section 1005(e)(2) of the Act stated that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final

decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and it further specified the scope and intensiveness of that review.

Then, on October 17, 2006, the President signed into law the Military Commissions Act of 2006, Pub. L. No. 109-___ (copy attached as Exhibit 3) ("MCA"). The MCA, among other things, again amends 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) *habeas* petitions "filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," or (2) "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," except as provided in section 1005(e)(2) and (e)(3) of the DTA.[4] *See* MCA § 7(a) (located on pages 36-37 of Exhibit 3). Further, the new amendment to § 2241 takes effect on the date of enactment and applies specifically "*to all cases, without exception, pending on or after the date of the enactment of this Act* which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." *Id.* § 7(b) (emphasis added).[5]

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[4] As noted above, DTA § 1005(e)(2) provides that the Court of Appeals "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," while DTA § 1005(e)(3), as amended by the MCA, provides that the Court of Appeals "shall have exclusive jurisdiction to determine the validity of any final decision rendered by a military commission," *id*. § 1005(e)(3).

[5] The Court of Appeals in certain of the pending Guantanamo detainee appeals, *Boumediene v. Bush*, No. 05-5062 (D.C. Cir.), and *Al Odah v. United States*, No. 05-5064 (D.C.

Petitioners' counsel has now filed a motion seeking entry of a protective order and counsel access procedures that have previously been entered in many of the Guantanamo detainee *habeas* cases that were filed prior to enactment of both the DTA and the MCA.[6] That protective order establishes a regime, *inter alia*, governing the handling of classified information in the litigation, requiring the government to seek Court permission to have certain information maintained under seal, and controlling issues related to counsel access to represented detainees. The counsel access procedures appended as Exhibit A to the protective order ("Access Procedures") also, *inter alia*, contemplate that the government permit qualifying counsel privileged face-to-face access to represented detainees, require the government to establish and operate a system of privileged "legal mail" between qualified counsel and represented detainees, command a government team to conduct classification review of certain materials on certain schedules, impose on the government a presumption that counsel may share classified information across cases in certain circumstances, and otherwise limit in significant ways the discretion the military would normally exercise with respect to mail and in-person access to wartime detainees such as Khan.

Cir.), has ordered the parties to submit supplemental briefing regarding the significance of the MCA. Such briefing is to be completed by November 20, 2006.

[6] *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004) ("Amended Protective Order"); Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Dec. 13, 2004); Order Addressing Designation Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Nov. 10, 2004).

ARGUMENT

I. THE COURT SHOULD NOT ENTER THE PRIOR GUANTANAMO PROTECTIVE ORDER REGIME PENDING RESOLUTION OF THE SERIOUS JURISDICTIONAL ISSUES IN THIS CASE.

The petition in this case was not properly filed in this Court, and the Court should not proceed to grant petitioners' counsel the relief they request – entry of the protective order used for other *habeas* cases that were filed at a time when the District Court retained *habeas* jurisdiction of petitions brought by Guantanamo detainees – pending resolution of the jurisdictional issue. First, as noted above, the petition in this case is neither signed nor verified by the next friend as required by 28 U.S.C. § 2242, which provides that an "[a]pplication for writ of *habeas corpus* shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." The petition, therefore, is defective and cannot serve as a basis for the relief requested by counsel.

Second, and not able to be remedied, is that this Court, by the explicit terms of the *habeas* statute, has lacked jurisdiction over this case since the day it was filed. Indeed, when the case was filed, the DTA provided that "no court, justice, or judge" had jurisdiction to consider either a *habeas* petition filed by an alien detained by DoD at Guantanamo or "any other action against the United States or its agents relating to any aspect of the detention" of such an alien. *See* DTA § 1005(e)(1). Moreover, currently, the *habeas* statute has been amended again by the MCA to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) *habeas* petitions "filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," or (2) "any other action against the United States or its agents

relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a) (amending 28 U.S.C. § 2241). This amendment of § 2241 applies specifically "*to all cases, without exception, pending on or after the date of the enactment of this Act* [October 17, 2006] which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." *Id.* § 7(b) (emphasis added). Thus, both the DTA, when this case was filed, and the MCA, currently, have provided unambiguously that District Court jurisdiction does not exist over a case like this. The only review mechanism available to a detainee such as Khan is the exclusive review provided in the Court of Appeals of a final CSRT decision determining the detainee to be an enemy combatant. *See supra* note 4 & accompanying text.

Thus, District Court jurisdiction over this case has never existed. Further, "'[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). Accordingly, the Court should not proceed to exercise jurisdiction and enter a protective order regime requested by petitioners' counsel that imposes multiple requirements upon respondents respecting counsel access to a detainee at Guantanamo. Such relief would require an assertion of jurisdiction and authority in this case inconsistent with MCA's clear and unequivocal denial of District Court jurisdiction over cases such as this.

Petitioners' counsel's argument that the Court should enter the prior protective order regime as it has in previous cases also ignores that when the Court did so previously, it was with respect to cases pending prior to enactment of the DTA and in circumstances (1) where there was at least a litigable issue regarding whether the provision explicitly eliminating *habeas* jurisdiction applied to such cases pending prior to the DTA's enactment, *see Hamdan*, 548 U.S. __, 126 S. Ct. at 2762-69, and (2) where the Court believed that respondents had in some fashion waived objection to entry of the protective order.[7] *See* Petrs' Motion at 3-4. Here, respondents clearly and firmly oppose entry of the protective order regime requested by petitioners' counsel. Furthermore, there is no question that the DTA's withdrawal of jurisdiction applied to this case, which was filed well after the DTA was enacted and became effective. Moreover, it is clear that the MCA's withdrawal of District Court jurisdiction, explicitly applicable to pending cases, also now governs.[8] Because the withdrawal of District Court jurisdiction is completely unambiguous, any past practice regarding entry of a protective order should have no bearing on the proper course of action in this case.

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[7] Respondents contest that any such waiver occurred or was even possible. *See generally Floyd v. District of Columbia*, 129 F.3d 152, 155 (D.C. Cir. 1997) (noting that "jurisdiction cannot be waived" and the Court has "an independent obligation to assure" itself of jurisdiction).

[8] That the DTA and MCA provide for an exclusive review mechanism in the D.C. Circuit to address the validity of a final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant, *see* § 1005(e)(1), (e)(2), also independently operates to deprive this Court of jurisdiction. *Cf., e.g.*, 5 U.S.C. § 703; *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984); *Laing v. Ashcroft*, 370 F.3d 994, 999-1000 (9th Cir. 2004); *Lopez v. Heinauer*, 332 F.3d 507, 511 (8th Cir. 2003); *Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 70, 75, 77-79 (D.C. Cir. 1984).

Petitioner undoubtedly will claim that the absence of District Court jurisdiction pursuant to statute in this case is unconstitutional or improper in some regard, *see* Petition ¶ 9 (asserting DTA's withdrawal of District Court jurisdiction violated Suspension Clause),[9] but this does not mean that counsel is entitled to entry of a protective order regime by the Court. For one thing, whatever arguments may be marshaled in favor of the existence of some form of jurisdiction ancillary to that in the Court of Appeals provided by the DTA and MCA, it is clear that such jurisdiction would not reside in the District Court, as opposed to some other court. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984) (request for relief in district court that might affect Court of Appeals' future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals); *cf. id.* at 77 ("By lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power."). In any event, consistent with the directives of the Supreme Court in *Steel Co.* and *Ex parte McCardle*, the most the Court should do is conduct proceedings to deal with the jurisdictional issue, *i.e.*, establish a schedule for a motion by respondents and follow-on briefing addressing the issue of the Court's jurisdiction in detail, while staying all other proceedings in this case, including with respect to petitioners' request for entry of a protective order regime. Alternatively, the Court should await consideration of the jurisdictional issue under the DTA and MCA by the Court of Appeals in the cases pending before it, *see supra* note 5, while staying *all*

[9] *But see*, *e.g.*, *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005) (aliens detained at Guantanamo are not possessed of constitutional rights); *see also Swain v. Pressley*, 430 U.S. 372, 381 (1977) (substitute remedy "which is neither inadequate nor ineffective to test the legality of a person's detention" does not violate Suspension Clause).

proceedings in the case – including with respect to petitioners' request for entry of a protective order regime.

Respondents' opposition to petitioners' motion for entry of a protective order regime is not intended to thwart altogether counsel access to Khan, on whose behalf this case is purportedly brought. However, a regime for counsel access should be developed or ordered by a forum court that, consistent with MCA and DTA, has jurisdiction with respect to claims brought on behalf of a detainee such as Khan.[10] Whatever the disagreements of petitioners' counsel with the regime envisioned by Congress under the MCA and DTA, it is clear that jurisdiction over this matter does not lie in District Court, and it would be improper for the Court to order relief in the interim that might infringe upon the jurisdictional scheme intended and provided by statute.[11] *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("'the power to award the writ by any of the Courts of the United States, must be given by written law'") (quoting *Ex Parte Bollman*, 8 U.S.

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[10] Petitioners' counsel's citation to *Al Odah v United States*, 346 F. Supp. 2d 1 (D.D.C. 2004), does not change this or justify imposition of a protective order regime notwithstanding the withdrawal of the Court's jurisdiction over this case under the MCA and DTA. *See* Petrs' Motion at 3. In *Al Odah* Judge Kollar-Kotelly explained that, despite there being no absolute right to counsel under the version of the *habeas* statute then in effect, the Court, under its discretionary, statutory authority in *habeas* cases — authority now withdrawn with under the MCA and DTA — could appoint counsel to represent Guantanamo petitioners properly before the Court, if warranted. *See* 364 F. Supp. 2d at 4-5, 7-8. Thus, contrary to petitioners' suggestion, notwithstanding the complete statutory withdrawal of jurisdiction over this case, *Al Odah* does not compel the relief requested by petitioners in this Court.

[11] Of course, under the Constitution the federal district courts exist as a creation of Congress. *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Logically then, because the Constitution contains no provision requiring the existence of district courts, there is no extra-statutory authority, under the Constitution or otherwise, that automatically vests district courts with *habeas* jurisdiction. *See*, *e.g.*, *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.").

(4 Cranch.) 75, 94 (1807)); *id.* ("judgments about the proper scope of the writ [of *habeas corpus*] are 'normally for Congress to make'") (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). *See also Telecommunications Research and Action Center,* 750 F.2d at 75, 78-79 (request for relief in district court that might affect Court of Appeals' future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals); *cf. id.* at 77 ("By lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power."). In the same vein, any protective order and counsel access regime should be properly tailored for purposes of the type of review proceeding provided for pursuant to statute; wholesale importation of a regime developed for *habeas* proceedings at a time when the District Court legitimately exercised *habeas* jurisdiction unconstrained by limits now set by statute, would not be appropriate. *Cf. id*. at 75, 77, 78-79.

Nor is counsel access necessary to proceed upon and resolve the jurisdictional issue. This case is purported brought by a next friend, and the jurisdictional issue is a question of law. Thus, the next friend, once she properly verifies the petition, can fully address, through counsel, the threshold legal issue of the Court's jurisdiction such that the Court can decide it as appropriate.

Nor do other factors warrant or require entry of a protective order and counsel access regime at this time. For example, petitioners' counsel's concern that Khan receive appropriate health services, *see* Petrs' Motion at 2, does not warrant imposition of a protective order and access regime. Aside from the fact that Congress in the MCA has explicitly rejected court consideration of conditions of confinement claims of any type, *see* MCA § 7(a) (denying court jurisdiction respecting, *inter alia*, "treatment . . . or conditions of confinement"), Guantanamo

detainees, including, now, Khan, are throughout their detention provided extensive medical care, as needed, the quality of which is comparable to that provided to active duty military members. *See* Declaration of Dr. Ronald L. Sollock ¶¶ 3-9 (attached as Exhibit 4).[12] Furthermore, the International Committee of the Red Cross is permitted access to Guantanamo detainees, and has been given access to Khan.[13] Thus, petitioners' counsel's asserted concerns on this front do not warrant the plain disregard of the statutory withdrawal of District Court jurisdiction.

Accordingly, the Court should not proceed to entry of a protective order regime in this case in the face of the unambiguous withdrawal of this Court's jurisdiction under the MCA and DTA.

II. REGARDLESS OF THE ABSENCE OF JURISDICTION, ENTRY OF THE PROTECTIVE ORDER REGIME REQUESTED BY PETITIONERS' COUNSEL IS NOT APPROPRIATE IN THE UNIQUE CIRCUMSTANCES OF THIS CASE.

Aside from the complete withdrawal of this Court's *habeas* jurisdiction under the DTA and MCA making entry of a protective order regime improper, entry of the particular protective order and counsel access regime requested by counsel would be inappropriate and improper given the unique circumstances of Khan and his prior CIA custody. As explained below, the protective order regime applicable in many other Guantanamo cases contemplates issues

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[12] Dr. Sollock is the Commander, U.S. Navy Hospital, Guantanamo Bay, Cuba, and he serves as the Joint Task Force Surgeon for Joint Task Force - Guantanamo Bay, Cuba. *See* Exhibit 4, ¶ 1. His attached declaration, which was previously submitted in redacted form in another Guantanamo detainee case, *Al-Ghizzawi v. Bush*, No. 05-CV-2378 (JDB), explains the extensive and high-quality medical care and facilities employed with respect to Guantanamo detainees. *See id.* ¶¶ 3-9.

[13] *See also* Washington Post, *Red Cross Meets With 14 Moved to Guantanamo Bay* (Oct. 13, 2006) (available at <<www.washingtonpost.com/wp-dyn/content/article/2006/10/12/AR2006101200635.html>>).

associated with the handling of information classified no higher than SECRET, while counsel access in this case will require appropriate provisions and protections to govern information potentially classified at the TOP SECRET//SCI level, by virtue of Khan's prior detention and involvement in the CIA's still highly classified high-value terrorist detainee program. Accordingly, entry of the protective order regime requested by petitioners' counsel would be inappropriate and should be rejected. If any protective order and counsel access regime is to be considered and potentially imposed by the Court, it should be one that, unlike the present Guantanamo protective order and counsel access regime, accounts for the national security concerns and classification issues unique to Khan and others like him, who were previously held in the high-value terrorist detainee program.

As explained *supra*, prior to his current DoD custody, Majid Khan was held in the custody of the CIA in that agency's high-value terrorist detainee program. *See* Dorn Decl. ¶¶ 7, 10. Further, because of Khan's involvement in the high-value terrorist detainee program, it is likely he will possess, and may be able to transmit to counsel, information that would be classified at the TOP SECRET//SCI level, such as detention locations and other operational details, or information that would warrant equivalent treatment or other special handling while Khan remains in United States' custody. *See id.* ¶¶ 8, 10, 16. For example, as explained in the Dorn Declaration, improper disclosure of operational details about the program, such as the locations of CIA detention facilities, would put United States' allies at risk of terrorist retaliation and betray relationships that are built on trust and are vital to efforts against terrorism. *See id.* ¶ 12. Improper disclosure of other operational details, such as interrogation methods, could also enable terrorist organizations and operatives to adapt their training to counter such methods,

thereby obstructing the CIA's ability to obtain vital intelligence that could disrupt future planned terrorist attacks. *Id.* ¶ 13. The appropriate and adequate protection of information that Khan may possess and may transmit to counsel, therefore, is imperative.

The protective order and counsel access regime entered in many other Guantanamo cases not involving detainees who had previously been held in the high-value terrorist detainee program, however, would be inadequate to protect the unique national security-related interests in this case. For example, the current protective order and counsel access regime applicable in various other cases filed at a time when the District Court had *habeas* jurisdiction, contemplates that counsel representing a detainee hold or obtain only a SECRET-level clearance, and, in fact, petitioners' counsel in this case holds only a SECRET-level clearance. *See* Access Procedures § III.A.1. Such a clearance would not permit counsel access to information classified or treated as TOP SECRET//SCI.[14] The counsel access regime further contemplates mailing of communications to counsel from a detainee or of notes of a counsel's meeting with a detainee from Guantanamo to the secure workspace facility for *habeas* counsel called for under the protective order. *See* Access Procedures §§ IV.B.3; VI.B; Amended Protective Order ¶ 20. While information classified at the SECRET-level can be sent through the mail, via certified mail, materials classified or treated as TOP SECRET//SCI, cannot. *See* Dorn Decl. ¶ 15; 32 C.F.R. § 2001.45(c), (d) (DoD regulation regarding handling of classified information).

Similarly, the secure workspace facility for *habeas* counsel is currently operated appropriately for handling of SECRET materials; additional facilities or capabilities would need

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[14] *See also Al Odah*, 346 F. Supp. 2d at 13-14 (contemplating a "framework for counsel access" in which "[c]ounsel would be required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee").

to be added if the facility was to handle material classified or treated as TOP SECRET//SCI. In that same vein, the operations of the current Privilege Team – the special DoD team responsible for conducting classification review of otherwise privileged counsel-detainee communications submitted to it for such review by *habeas* counsel[15] – are geared to deal with materials potentially classified at the SECRET level, and revisions would be necessary if the Privilege Team was required to deal regularly with materials that were potentially classified TOP SECRET//SCI.

The current protective order regime also provides a presumed "need to know" between counsel in related Guantanamo detainee cases pending before the Court. *See* Protective Order ¶ 29. Not only is such a presumption inappropriate generally, *see*, *e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 527-30 (1988) (authority to control access to classified information is constitutionally vested in the President as head of the Executive Branch and Commander in Chief and should not be intruded upon by the courts "[f]or reasons . . . too obvious to call for enlarged discussion"), it is especially inappropriate in this case, given the potential that information involved in this case could require classification or treatment at a TOP SECRET//SCI level – based upon the possibility of "exceptionally grave damage" to national security and, beyond that, the determination that the information is so exceptionally sensitive that normal criteria for access and handling of even TOP SECRET information are not sufficient. *See* Dorn Decl. ¶¶ 8-10.

[15] *See* Access Procedures § VII.; *see also id.* § IV.A.6. (counsel required to treat information learned from a detainee, "including any oral and written communications with a detainee," as classified pending review by Privilege Team).

Such a presumption, and placement of the burden upon the government to overcome the presumption,[16] is improper, especially in a case like this.

These constitute but several examples of provisions of the protective order and counsel access regime and implementation of that regime that would need to be reworked or revised to address information classification concerns associated with counsel access for Khan. *See* Dorn Decl. ¶ 15 ("A protective order that allows individuals without the necessary security clearances access to TOP SECRET//SCI information, or permits the use of procedures not appropriate for TOP SECRET//SCI information, cannot possibly begin to adequately protect such information from unauthorized disclosure."). The Supreme Court has recognized the responsibility of the Executive to safeguard and protect classified and other national security information adequately, as well as the responsibility of courts to defer to protective measures the Executive deems appropriate. *See*, *e.g.*, *Egan*, 484 U.S. at 527-30 (authority to control access to classified information is constitutionally vested in the President as head of the Executive Branch and Commander in Chief and should not be intruded upon by the courts "[f]or reasons . . . too obvious to call for enlarged discussion"); *see also Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."). The Court should not proceed with entry of a protective order regime that fails to address classification-level concerns in this case such as those raised above.

Aside from the facial inadequacies discussed above of the protective order regime sought by petitioners' counsel, various gaps or vagueness in the current protective order regime have led

[16] The Protective Order permits respondents to "challenge" the "presumption on a case by case basis for good cause shown." Given the classification level issue, however, the presumption is problematic *ab initio*.

to problems in implementation that have created risks to camp security and other issues. For example, the current Access Procedures provide that all "[w]ritten and oral" communications with detainees, "including all incoming legal mail," must not include

> information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

Access Procedures § IV.A.7; *see also id.* § V.B. (imposing same restrictions upon materials brought into face-to-face meetings with detainees). This prohibition was instituted because permitting such information to be introduced into the detainee population at Guantanamo, *inter alia*, could threaten security by causing unrest or disruption among the enemy combatant detainees, who have a motivation and purpose to resist their confinement and cause harm or death to the United States personnel who presently confine them.[17] However, apparent vagueness of the limitation on the provision permitting counsel to provide a detainee with information "directly related" to the representation of the detainee, along with the prohibition on any screening of "legal mail" except for physical contraband, *see id.* § IV.A.3, has resulted in the introduction into the detainee population of current events information and advocacy pieces likely to incite detainees, with Guantanamo authorities left to learn of such incidents only after the information had already been introduced into the detainee population. *See* Declaration of

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[17] In fact, just a few months ago, on May 18, 2006, a number of detainees in a communal housing facility at Guantanamo banded together and ambushed and attacked guards using weapons fashioned from fans and other materials in the housing bay. *See*, *e.g.*, Kathleen T. Rhem, *Skirmish With Guards, Two Suicide Attempts Test Guantanamo Procedures* (available at <<www.defenselink.mil/news/May2006/20060519_5177.html>>).

Commander Patrick M. McCarthy (attached as Exhibit 5).[18] Also, other counsel have used their access to the base and detainees for media reports or to permit detainees to provide information to the media, instead of for litigation purposes. *See id*. ¶¶ 7-8.

These are concerns or loopholes in the current protective order regime, the perpetuation of which would not be appropriate, especially in a case such as this involving heightened levels of classification and sensitivity. (Indeed, as a result of such problems, and others, the government has sought entry of a revised protective order and counsel access regime in one of the review petitions filed under DTA § 1005(e)(2), *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir.).[19]) The Court should not impose a regime, such as that requested by counsel, that has permitted the introduction of risks and threats to camp security and other improprieties that can only be discovered after the fact. *Cf. Hamdi v. Rumsfeld*, 296 F.3d 278, 282-83 (4th Cir. 2002) (district court order requiring unmonitored access to wartime detainee improper where entered without briefing and argument to resolve serious questions of propriety of such access in wartime setting); *cf. also Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 890, 893 (1961) (military base commanders have "historically unquestioned" authority to control access to base for purposes of maintaining order and the safety of personnel); *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) ("Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.").

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[18] Commander McCarthy serves as the Staff Judge Advocate at Guantanamo. His attached declaration was submitted in DTA review petition case filed pursuant to DTA § 1005(e)(2) on behalf of a Guantanamo detainee, *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir.), and describes several incidents reflecting shortcomings of the protective order regime requested by petitioners' counsel in this case that have resulted in practical security risks to Guantanamo.

[19] The *Bismullah* matter is currently being briefed.

The problems outlined above with the protective order and counsel access regime requested by petitioners' counsel are examples only. The requested regime would need to be reworked substantially in a number of different ways to address both the nature of the information likely to arise in connection with a detainee such as Khan, as well as the nature of the proceeding that is appropriate in this matter.[20]

Accordingly, the Court should not proceed to entry of the protective order regime requested by petitioners' counsel in this case for a number of independent reasons. The Court should not enter the protective order regime in the face of the unambiguous withdrawal of this Court's jurisdiction under the MCA and DTA. The Court, rather, should deal with the jurisdictional issue in this matter first, by establishing a reasonable schedule for a motion by respondents and follow-on briefing addressing the issue of the Court's jurisdiction in detail, or by awaiting consideration of the jurisdictional issue by the Court of Appeals in the cases pending before it, while in the meantime staying other proceedings – including with respect to petitioners' request for entry of a protective order regime – pending resolution of the jurisdictional issue.[21]

CONCLUSION

For these reasons, petitioners' motion seeking entry of the protective order and emergency access in this case should be denied.

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[20] *See supra* at 13.

[21] In any event, because the protective order regime requested by counsel is not appropriate – in fact, is wholly inadequate – given the special circumstances of this case, if the Court, despite the jurisdictionally defective nature of this proceeding, determines that a protective order regime should be pursued in this Court, the Court, for the reasons discussed above, should permit respondents a reasonable time to propose such a regime, confer with petitioners' counsel regarding it, and present a proposal to the Court.

Dated: October 26, 2006

Respectfully submitted,

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